80-646

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOHN R. CONNOR, Petitioner,

v.

GEORGE WARREN, Administrator,
Estate of Mary A. Connor,
Deceased, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

	Page
Questions presented	2
Parties to the proceeding	2
Jurisdiction	3
Constitutional provisions and court rules involved	3
Statement	4
Reasons for granting the writ	14
Conclusion	40
Appendix A	1a
Appendix B	3a
Appendix C	6a
Appendix D	7a
Appendix E	8a
Appendix F	10a
Appendix G	11a
Appendix H	12a
Appendix I	13a
Appendix J	15a
Appendix K	16a
Appendix L	17a

TABLE OF AUTHORITIES

Cases: Page

Aris Gloves, Inc. v. U. S., 188 F. Supp. 50 (Cust. Ct. 1960)..... 28,32

Berkowitz v. Lyons, 98 N. J. L. 198, 119 A. 20 (1922)..... 35

Bluth v. Laird, 435 F.2d 1065(C.A. 4).. 26

Brown v. Ryder, 42 N. J. Eq. 358, 7A. 568 (Prerog. Ct. 1886) 12

Central Republic Bank & Trust Co. v. Caldwell, 58 F.2d 721, 731 (C. C. A. Mo. 1932)..... 20

Commercial Standard Ins. Co. v. Garett, 70 F.2d 969 (C. C. A. Okla. 1934)..... 34

Cowley v. Smith, 46 N. J. L. 380, 50 Am. Rep. 432 (1884)..... 36

Dation v. Ford Motor Co., 314 Mich. 152, 22 N.W.2d 252, 258 (1946)..... 25

Duff v. Sherlock, 432 F. Supp. 423 (D. C. Pa. 1977)..... 37

Dupu, v. Tedora, 204 La. 560, 15 So.2d 886, 890 (1943)..... 25

Field v. Boyle, 503 F.2d 774 (C. C. A. Ill. 1974)..... 25

Frantz Equipment Co. v. Anderson, 37 N. J. 420, 181 A.2d 499 (1962).....29,32

Green Bay v. Patten Paper Co., 172 U.S. 58 (1898)..... 14

Page

Heyer v. Sullivan, 88 N. J. Eq. 165, 102 A. 248 (Sup. 1917), affirmed 88 N. J. Eq. 595, 103 A. 1052 (E. & A. 1918)..... 17

Hill's Executor v. Smalley, 25 N. J. L. 374 (Sup. 1856)..... 17

Holcomb v. Coryell, 12 N. J. Eq. 289 (1857)..... 30

Holly Development, Inc. v. Board of County Comrs., 140 Colo. 95, 342 P.2d 1032 (1959)..... 28

In the matter of the Estate of William Hadfield, Deceased, 70 N. J. Super. 483 (Union County Ct. 1961)..... 21,22

In re East Windsor Mun. Util. Auth. v. Shapiro, 57 N. J. 169, 170 (1970)..... 16

In re State Treasury Note Indebtedness, 185 Okla. 10, 90 P.2d 19, 22 (1939).....34

In re Weeks, 4 F. Supp. 558, 560 (D. C. Texas 1933).....29

Luedeke v. Rosell, 115 N. J. L. 194, 178 A. 799 (1935).....36

Lyster v. Berberich, 3 N. J. Super. 78, 65 A.2d 632 (App. Div. 1949)...36

Neilson v. Russell, 76 N. J. L. 655, 659, 71 A. 286, 288, 19 L. R. A., N. S. 887, 131 Am. St. Rep. 672 (E. & A. 1908).....17

Polizzotto v. D'Agostino, 170 La. 932, 129 So. 534, 536 (1930).....34,35

Page

Portage Shoe Mfg. Co. v. Reich, 53 N. J. Super. 600, 148 A.2d 47 (1959) 29,33

Potter Title and Trust Co. v. Berkshire Life Ins. Co., 156 Pa. Super. 1, 39 A.2d 268 (1944) 29

Shammas v. Shammas, 9 N. J. 321, 88 A.2d 204 (1952) 39

Sinclair v. Sinclair, 196 Tenn. 538, 268 S.W.2d 573, 575 (1954) 25

The Mechanics National Bank at Newark v. Burnet Manufacturing Company, 33 Eq., 6 Stew. 487 (1881) 38

Tidewater Oil Co. v. Mayor and Council of Cartaret, 44 N. J. 338, 342, 209 A.2d 105, 106 (1965) 16

Tooele Meat & Storage Co. v. Morse, 43 Utah 515, 136 P. 965 (1913) 29

Trinity Episcopal Corp. v. Romney, 387 F. Supp. 1044, 1084 (D. C. N. Y. 1974) 37

Washington Nat. Ins. Co. v. Board of Review of N. J. Unemployment Compensation Commission, 1 N. J. 545, 64 A.2d 443 (1949) 25

Wilson v. City of Long Branch, 27 N. J. 360, 142 A.2d 837, cert. denied 358 U. S. 873 (1958) 34

Page

Constitution, statutes and court rules:

United States Constitution:

Fourteenth Amendment.....3,14,18,24,27

New Jersey Statutes:

N.J.S.A. 3A:3-19..... 9,37

N.J.S.A. 3A:6-4.....30,31,32,33

New Jersey Rules:

C.P.R. 2:2-1(a)..... 11,14

C.P.R. 4:34-1(b)..... 8

C.P.R. 4:67..... 11,20

C.P.R. 4:84-1(b).....3,9,19,21, 23,26

C.P.R. 4:99-1(b).....4,9,19,20, 21,26

Miscellaneous:

33 C. J. S. Executors and Administrators §30 (1979)..... 24,31

8 N. J. Practice, Clapp, Wills and Administration §2283 (1978)..... 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

Petitioner John R. Connor, Executor-designate of the Estate of Mary A. Connor, Deceased, hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

QUESTIONS PRESENTED

1. Whether the appointment of an estate Administrator, obtained without issuance of an Order to Show Cause, and under circumstances where the court possessed prior knowledge that decedent had died testate, and had appointed an executor, is void under the Due Process Clause of the Fourteenth Amendment?

2. Whether a Notice of Application for Letters of Administration on a decedent's estate, not predicated upon a statutory requirement of "intestacy," is void under the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING ARE:

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JURISDICTION

The order of the New Jersey Supreme Court dismissing the within appeal (App. C, infra, p. 6a) was entered on June 25, 1980. On July 23, 1980 the New Jersey Supreme Court denied a Petition for Rehearing (App. D, infra, p. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(c). The opinions herein are not reported.

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED.

The Fourteenth Amendment to the United States Constitution provides in part:

> No State * * * shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N. J. Sup. Ct. C.P.R. 4:84-1(b) provides in part:

> The Superior Court for good cause or if a caveat is filed or a dispute arises, may issue an order to show cause why the probate or letters sought should not be granted. The order to show cause and the complaint may be served as provided by R. 4:67-3 * * *

N. J. Sup. Ct. C.P.R. 4:99-1(b) (1968) provides in part:

> Actions in the Superior Court relating to estates of decedents * * * may be brought in summary manner, if the court so orders. Actions on notice * * * may be tried and, except where these rules otherwise direct, proceedings may be taken as in an action brought in a summary manner under R. 4:67 * * * Nothing contained in R. 4:80 to R. 4:99 shall affect the right of the Superior Court to proceed in a plenary manner in any action.

STATEMENT

On November 24, 1977 Decedent Mary A. Connor passed away in Overlook Hospital in Summit, N. J. as a result of cardiac shock following exploratory surgery.

Since 1969 Mrs. Connor had been the plaintiff in the matter of Connor v. Flynn, litigation which originated in the Superior Court of New Jersey, Chancery Division, but which, at the time of her death, was pending in the Appellate Division of the Superior Court.[1]

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[1] Connor v. Flynn, Docket No. C-2565-68 (trial); Docket No. A-2853-74 (Appellate Division); Docket No. 16,605 (Supreme Court).

Subsequent to her death, Petitioner, who is not only her son but also is appointed Executor in her Last Will and Testament, became occupied for several months with many of the highly questionable circumstances surrounding her sudden death -- and, in particular, with the legal adequacy of the "cause of death" listed on her death certificate.

On January 10, 1978, Mr. Albert G. Besser, Esq., an attorney who had previously represented decedent in Connor v. Flynn and who, on May 11, 1977 had had an October 28, 1975 award of $28,657.94 in attorneys' fees reversed by judgment of the Appellate Division, communicated with the Hon. Arthur C. Dwyer, J.S.C., presiding Chancery justice in the matter of Connor v. Flynn, to secure a date for a new trial on the firm's application for legal fees, the matter having been remanded for a re-trial.[2] (App. E, infra, pp. 8,9a).

[2] Connor v. Flynn, Docket No. A-898-75.

In response to Attorney Besser's request, the court scheduled a plenary hearing on the question of counsel fees for March 2, 1978. (App. F, infra, p.10a).

On February 27, 1978 there ensued an event, the facts of which are critical to a determination of this Petition. On that day Petitioner personally hand-delivered a letter of previous date to Justice Arthur C. Dwyer, J.S.C. (App. G, infra, p. 11a). [The letter was actually given to Justice Dwyer's clerk, His Honor having remained in his chambers, albeit clearly visible and within hearing distance of the ensuing conversation.]

Judge Dwyer's clerk immediately inquired whether Petitioner would be appearing at the "plenary hearing" set for March 2, 1978. Petitioner informed him that his mother, party-plaintiff in Connor v. Flynn, was deceased, that he did not intend to appear on that date, that he would not be attending

any court hearings until Mrs. Connor's will had been probated and Petitioner had legally been substituted for her as party-plaintiff, and that probate would be delayed by Petitioner until her death certificate had been corrected to conform with the true cause of death, whatever that might eventually be determined to be.[3]

Judge Dwyer's clerk then attempted to persuade Petitioner to attend the March 2, 1978 hearing, anyway, stating that "Mr. Besser will be there." The clerk also remarked that the court already knew of Mrs. Connor's death and that Judge Dwyer would allow Petitioner to appear without being substituted as party-plaintiff, in view of the fact that the court had permitted Petitioner to appear on decedent's behalf over the years in Connor v. Flynn, in spite of the fact that Petitioner was neither an attorney nor a party to that litigation.

---

[3] Under the terms of Mrs. Connor's Last Will and Testament, Petitioner was bequeathed decedent's interest in Connor v. Flynn.

Petitioner again replied that he would not be appearing in court on March 2, 1978 and handed the aforementioned letter to the clerk. (App. G, infra, p. 11a). This letter discusses the proper forum for filing a Motion for Substitution of Parties in Connor v. Flynn (R. 4:34-1b) and is signed by Petitioner as Executor, with a copy to Attorney Besser.

Petitioner did not appear in court on March 2, 1978, for reasons aforesaid, and on or about March 4, 1978 he received a letter from the firm of Hannoch, Weisman, Stern & Besser advising of the firm's intention to bring an action "to secure letters of administration upon the Estate of Mary A. Connor." (App. H, infra, p. 12a).

On March 21, 1978 Hannoch, Weisman, Stern & Besser sent out a notice (without complaint) entitled "Action for Letters of Administration" whereon, alleging the status of creditor, it announced that an application would be made to the Chancery court on

May 22, 1978 for the appointment of an Administrator on the grounds that "you [have] failed for more than 40 days from her death to probate any Will or to make application for Letters of Administration." (App. I, infra, p. 13a).

Upon receipt of this notice, Petitioner contacted Mr. E. Gilman Slingerland, Jr., Esq., Slingerland & Slingerland, Maplewood, New Jersey, the attorney who had prepared Mrs. Connor's will, and inquired whether there was any specific time limit within which that will had to be probated. Petitioner was told by Mr. Slingerland that there wasn't any, except, that by statute (N.J.S.A. 3A:3-19) a will could not be probated within ten days following death.

Petitioner, in reliance upon R. 4:84-1(b) and R. 4:99-1(b) and his previous written and oral communications with the court advising of decedent Mary A. Connor's testacy and the fact that Petitioner was appointed Executor, did not appear in court on May 22,

1978 for Attorney Besser's application for letters of (intestate) administration.

The court, however, despite its knowledge of decedent's testacy and Petitioner's executorship, elected not to deny this counterfeit application but to consider it unopposed, and entered judgment on May 26, 1978 granting letters of administration to Mr. George Warren, Esq. (App. A, infra,pp. 1, 2).

Petitioner declined to accept the validity of this Administrator's appointment and commenced the within series of appeals.

Petitioner's first "due process" argument for reversal of the Administrator's appointment was advanced in his brief filed with the Appellate Division of the Superior Court of New Jersey, and reads:

> The 25 May, 1978 Judgment appointing George Warren, Esq. as administrator of the Estate of Mary A. Connor is null and void ab initio because said judgment was obtained in violation of Appellant's constitutional rights to due process of law.

In his brief filed with the Appellate Division, Petitioner's principal "due process" argument was basically predicated on the trial court's failure to proceed via order to show cause (R. 4:67) on the Hannoch application. The Appellate Division, however, affirmed the judgment of the lower court on the ground, inter alia, that it had found "appellant's arguments for reversal to be unpersuasive." (App. B, infra, p. 3a).

Petitioner then filed an appeal as of right (R. 2:2-1) with the New Jersey Supreme Court where, in addition to rearguing the "due process" issue of the trial court's failure to issue a show cause order, Petitioner advanced the additional argument that the Hannoch "notice" was defective in its failure to allege decedent's intestacy.

By Order filed June 25, 1980, the appeal was dismissed for "failure to state a substantial constitutional question as required by R. 2:2-1(a)." (App. C, infra, p. 6a). Petitioner then filed a Petition for Rehear-

ing, which was denied on July 23, 1980 (App. D, infra, p. 7a).

Although the specific issue raised in this Petition deals exclusively with the validity of the trial court's May 26, 1978 judgment appointing an administrator for the Estate of Mary A. Connor, it is pertinent to remark on the ensuing conduct of the Administrator and his sponsor, Hannoch, Weisman, Stern & Besser.

Following his appointment, and during the pendency of Petitioner's various appeals of that appointment in the New Jersey courts, Administrator Warren continued to administer the within estate -- in spite of the fact that, under New Jersey probate law, those appeals had the operative, legal effect of suspending his powers. Brown v. Ryder, 42 N. J. Eq. 358, 7 A. 568 (Prerog. Ct. 1886).

On September 23, 1989 the Administrator actually procured the arrest of Petitioner, who, in order to gain his release from a

4-day jail confinement, was compelled to surrender both his mother's will and all estate assets to the court.

For their efforts, Administrator Warren, who was allowed to resign his office, and the Hannoch firm, were awarded the collective total of $10,163.60 by the court, said monies to be paid out of the Estate!

The Hannoch firm then proceeded to have Petitioner "disqualified" from serving as executor, securing the appointment of an Administrator, C. T. A., in order to assist that firm in its constant scheming to unlawfully remove monies from a court-administered trust fund, which constitutes a principal estate asset.

* * * * *

[Petitioner's Affidavit attesting to the truth of the matters contained in the within Statement is attached hereto as Appendix L, infra, p. 17a.]

REASONS FOR GRANTING THE WRIT

The order of the New Jersey Supreme Court which is the object of this Petition dismissed Petitioner's appeal for "failure to state a substantial constitutional question as required by R. 2:2-1(a)." (App. C, infra, p. 6a).

The U. S. Supreme Court in Green Bay v. Patten Paper Co., 172 U. S. 58 (1898) held that:

> No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted and it is sufficient if it appears from the record that such right was specially set up or claimed in the state court in such a manner as to bring it to the attention of the court.

Id., at 58. Under this criteria, Petitioner's claim asserting violation of his XIV Amendment "due process" rights was set up at the earliest possible opportunity, given the circumstances of this case: in his brief filed with the Appellate Division of

the Superior Court of New Jersey. (See: Statement, infra, pp. 10-11). In his appellate brief Petitioner argued that his "due process" rights were violated when the trial court appointed an administrator for the Estate of Mary A. Connor without issuing a show cause order and complaint in the matter under circumstances where the trial court had prior knowledge that decedent had died testate and that Petitioner was appointed executor. The decision of the appellate court (App. B, infra, p. 3a) simply stated that it found this argument to be "unpersuasive."

On further appeal to the New Jersey Supreme Court Petitioner reargued this issue and added, as an additional ground for reversal, the argument that the Hannoch notice of application for letters of administration was "defective" because it was not predicated on a claim of "intestacy." The appeal being dismissed, for reasons aforesaid, Petitioner applied for a rehearing, which

was denied. (App. D, infra, p. 7a).

A preliminary question to be answered in this case is whether the two constitutional questions posed are "substantial"?

Under New Jersey law, an appellant is only entitled to a second appeal as of right "where the record reveals a substantial rather than merely a colorable question arising under the federal or state constitutions that has not been the subject of a conclusive judicial determination." In re East Windsor Mun. Util. Auth. v. Shapiro, 57 N. J. 169, 170 (1970). The constitutional points raised must not be palpably insubstantial. Tidewater Oil Co. v. Mayor and Council of Cartaret, 44 N. J. 338, 342, 209 A.2d 105, 106 (1965).

The operative facts of the within case establish that Petitioner was arbitrarily deprived of the office of executor of his late mother's estate not only on account of the failure of the trial court to follow

its own rules but also by a misleading, and probably fraudulent, "notice" prepared by one of decedent's former attorneys.

Accordingly, the "due process" questions arising herein, where Petitioner has been deprived of his title and right to the office of executor, are substantial because, under New Jersey law, said title and powers constitute a property right due to the fact that "[a]n executor derives from the will his title and authority respecting the decedent's personalty on the instant of the testator's death." Hill's Executor v. Smalley, 25 N. J. L. 374 (Sup. 1856). Heyer v. Sullivan, 88 N. J. Eq. 165, 102 A. 248 (Sup. 1917), affirmed 88 N. J. Eq. 595, 103 A. 1052 (E. & A. 1918). Neilson v. Russell, 76 N. J. L. 655, 659, 71 A. 286, 288, 19 L. R. A., N. S., 887, 131 Am. St. Rep. 672 (E. & A. 1908).

The second part of New Jersey's "substantial question" test is very easily answered in this case. Neither of the specific con-

stitutional questions presented in this case and reargued in this Petition for a writ of certiorari has been the subject of a prior conclusive judicial determination.

Moreover, the New Jersey Supreme Court's reason for dismissing Petitioner's appeal is in conflict with many decisions, discussed hereinafter, from other state courts of last resort, as well as federal courts of appeal, on the issue of what constitutes procedural "due process" under the Fourteenth Amendment.

a. Whether the appointment of an estate Administrator, obtained without issuance of an Order to Show Cause, and under circumstances where the court possessed prior knowledge that decedent had died testate, and had appointed an executor, is void under the Due Process Clause of the Fourteenth Amendment?

The pertinent procedures governing an application for letters of administration are spelled out in the Civil Practice Rules listed in the Rules Governing the Courts of the

State of New Jersey and, for purposes of this Petition, R. 4:99-1(b) and R. 4:84-1(b).

R. 4:94-1(b) PROBATE ACTIONS: IN GENERAL, Summary Actions provides that:

> Actions in the Superior Court relating to estates of decedents * * * may be brought in summary manner, if the court so orders. Actions on notice * * * may be tried and, except where these rules otherwise direct, proceedings may be taken as in an action brought in a summary manner under R. 4:67 * * * Nothing contained in R. 4:80 to R. 4:99 shall affect the right of the Superior Court to proceed in a plenary manner in any action. (emphasis added)

R. 4:84-1(b) provides that:

> The Superior Court for good cause or if a caveat is filed or a dispute arises, may issue an order to show cause why the probate or letters sought should not be granted. The order to show cause and the complaint may be served as provided by R. 4:67-3 * * * (emphasis added)

R. 4:99-1(b) gives to the trial divisions of the Superior Court the option of proceeding either in a summary or a plenary

manner in summary probate actions. If the proceeding is to be summary, R. 4:99-1(b) provides that it is to be brought under R. 4:67, which rule states:

> If the action is brought in a summary manner pursuant to R. 4:67-1(a), the complaint, verified by affidavit * * * may be presented to the court ex parte * * * [t]he court, if satisfied with the sufficiency of the application, shall order the defendant to show cause why final judgment should not be rendered for the relief sought.

The reference to "plenary manner" in R. 4:99-1(b) means, in common legal usage, nothing less than a full trial. "'Plenary suit' differs from 'summary proceeding' in that it proceeds on formal pleadings, formal summons brings in parties; fime for pleading and hearing is had, usually by examination of witnesses." Central Republic Bank & Trust Co. v. Caldwell, 58 F.2d 721, 731 (C. C. A. Mo. 1932).

In the within case, neither of the two

prescribed courses of action was followed by the trial court. The Hannoch complaint was presented to the court ex parte -- however it was never served upon any member of decedent's family in accordance with R. 4:99-1(b) or R. 4:84-1(b), which rules Petitioner relied upon, to his detriment.

R. 4:84-1(b) would require the issuance of a show cause order on the Hannoch application because a "dispute" had arisen within the meaning of that rule, as interpreted by the New Jersey courts.

In the matter of the Estate of William Hadfield, Deceased, 70 N. J. Super. 483 (Union County Ct. 1961) involved a very similar factual situation to the within case. Hadfield concerned an application to set aside a surrogate's judgment granting letters of administration to an administrator. In granting the application, the Union County Court, Probate Division, held that the surrogate had been deprived of juris-

diction to act because a "dispute" had arisen when the applicant, an attorney, conferred with a probate clerk in the surrogate's office advising the clerk that he "anticipated" receiving powers of attorney from the heirs authorizing his appointment, and the attorney confirmed the conversation with a letter to the Surrogate:

> Furthermore, the conference of August 9, 1961 with the probate clerk, and the letter of the same date to the surrogate, created a dispute in the surrogate court within the meaning of R.R. 5:3-3 (a)(1). This dispute deprived the surrogate of jurisdiction to make any appointment at all. In re Alexandravicus, supra. Accordingly, the action of the surrogate will be set aside.

Id., at 486. Therefore, given the Hadfield interpretation of "dispute," Petitioner's February 27, 1978 conversation with Chancery Justice Dwyer's clerk, informing him of Mrs. Connor's testacy, and the February 26, 1978 letter to the court, which Petitioner signed as executor (See: Statement, infra,

pp. 6-8], are indistinguishable from the type of occurrences which sufficed to create the "dispute" in Hadfield, supra.

Accordingly, Petitioner's actions served to notice a "dispute" within the meaning of R. 4:84-1(b) and the trial court should not have appointed an administrator without first serving a show cause order and the Hannoch complaint upon Petitioner and all other members of decedent's family.

* * *

It is Petitioner's contention that a show cause order was the maximum allowable action that the trial court should have taken on its review of the Hannoch application for letters. In point of fact, given the court's knowledge of decedent's testacy, as well as Petitioner's executorship, this application should have been denied by the court.

As a matter of law, it would appear that because the trial court already knew that a

will existed, the judgment appointing an (intestate) administrator is void ab initio. "A grant of administration as in case of intestacy, where the decedent left a valid will which was not known of at the time, but is afterward produced and probated, is voidable only and not void ..." 33 C. J. S. Executors and Administrators, §30 at 920 (1979). Impliedly then, according to Corpus Juris Secundum, a grant of administration where the decedent left a valid will which was known of at the time of the appointment is void and ultra vires.

* * *

The failure to follow the rules in the matter of the Hannoch application for letters of administration on this estate establish a serious abridgment of Petitioner's "due process" rights.

The constitutional limitations in the XIV Amendment and in the "due process" limitations of the state constitution are designed

to safeguard fundamental rights of persons and property against arbitrary and oppressive state action. Washington Nat. Ins. Co. v. Board of Review of N. J. Unemployment Compensation Commission, 1 N. J. 545, 64 A.2d 443 (1949). "'[D]ue process of law' means, in the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights..." (emphasis added) Sinclair v. Sinclair, 196 Tenn. 538, 268 S.W.2d 573, 575 (1954). Accord: Dupuy v. Tedora, 204 La. 560, 15 So.2d 886, 890 (1943). Dation v. Ford Motor Co., 314 Mich. 152, 22 N.W.2d 252, 258 (1946).

"Due Process questions under the Federal Constitution may be presented either by failure of the state to follow its own rules or by state rules serving as a deprivation of due process." Field v. Boyle, 503 F.2d 774 (C. C. A. Ill. 1974). And "[w]here the sovereign has established rules to govern

its own conduct it will be held to self-imposed limitations on its own authority, departure from which denies procedural due process." Bluth v. Laird, 435 F.2d 1065 (C. A. 4).

The operative facts herein establish conclusively that the trial court substantially departed from -- in fact, totally failed to follow -- those court rules, R. 4:99-1(b) and R. 4:84-1(b), which govern summary probate applications of this type.

Given the court's knowledge of decedent's testacy and Petitioner's executorship, the Hannoch application for letters of admininistration should have been denied. At the maximum, the court should have done no more than issue a show cause order and complaint, in accordance with R. 4:84-1(b).

For the Chancery court to proceed to judgment, on a complaint filed ex parte, under the circumstances of this case, not only violated the aforesaid court rules

but also constituted an "arbitrary and capricious" action, in violation of this Petitioner's Fourteenth Amendment "due process" rights.

b. Whether a Notice of Application for Letters of Administration on a decedent's estate, not predicated upon a statutory requirement of "intestacy," is void under the Due Process Clause of the Fourteenth Amendment?

The second "due process" issue addressed in this Petition is whether the Hannoch Notice for Letters of Administration (App. I, infra, p.13a) constitutes a substantial compliance with the controlling statute or whether the process, itself, is so radically defective that it amounts to no legal process at all.

The test to determine the legal sufficiency of a notice is that "[a] notice must be clear, definite, and explicit, and not ambiguous." Aris Gloves, Inc. v. U.S., 188 F. Supp. 50 (Cust. Ct. 1960). Accord: Holly Development, Inc. v. Board of County Comrs., 140 Colo. 95, 342 P.2d 1032 (1959).

"Clearness" has been defined by the New Jersey Supreme Court to mean that "it [the notice] should give the necessary in-

formation * * * the notice is not clear unless its meaning can be comprehended without explanation." Frantz Equipment Co. v. Anderson, 37 N. J. 420, 181 A.2d 499 (1962). Accord: In re Weeks, 4 F. Supp. 558, 560 (D. C. Texas 1933). (emphasis added).

The general rule is that where a method of giving notice is prescribed by statute, such method is exclusive and there must be strict compliance with the statute. Potter Title and Trust Co. v. Berkshire Life Ins. Co., 156 Pa. Super. 1, 39 A.2d 268 (1944).

Where, however, the statute does not prescribe a form of notice the issue then becomes whether the notice given constitutes a "substantial compliance" with the statute, construed in the light of its intent and purpose. Portage Shoe Mfg. Co. v. Reich, 53 N. J. Super. 600, 148 A.2d 47 (1959). Accord: Tooele Meat & Storage Co. v. Morse, 43 Utah 515, 136 P. 965 (1913).

The pertinent and controlling statute

in this case is N.J.S.A. 3A:6-4 Letters of Administration, which states:

> If any person dies intestate, administration of the personal estate of such intestate shall be granted to the surviving spouse of such intestate, if he or she will accept the same, and, if not, or if there be no such person, then to the next of kin of such intestate, or some of them, if they or any of them will accept the same, and, if none of them will accept the same, then to such other proper person as will accept same.
>
> If such intestate leaves no relations justly entitled to the administration of his personal estate, or if his next of kin shall not claim the administration within 40 days after the death of such intestate, the superior court or surrogate's court may grant letters of administration to any fit person applying therefor. (emphasis added)

The legal distinction between a general administrator and an executor is that the former is appointed by the court where there is an intestacy, whereas the latter is appointed by the will of the decedent. Holcomb v. Coryell, 12 N. J. Eq. 289 (1857).

The critical and operative word in N.J.S.A. 3A:6-4, appearing no less than six

times, is "intestate" and Petitioner submits that any notice of application for letters under N.J.S.A. 3A:6-4 must include a claim of intestacy because "it is a necessary prerequisite to a grant of ordinary administration on the estate of a decedent that he should have died intestate." 33 C. J. S. "Executors and Administrators," §30, p. 920 (1979). "A grant of such administration necessarily involves, and is based on, a finding or adjudication of intestacy..." Id., at 920.

The Hannoch "notice" (App. I, infra, p. 13a) absolutely fails to assert decedent Mary A. Connor's intestacy but, instead, merely states as the grounds for the application:

> "you having failed for more than 40 days from her death to probate any will or to make application for Letters of Administration." (App. I, infra, p.13a)

Neither of the two reasons stated in the Hannoch notice is legally sufficient to serve as a basis for the application because of the

fact that N.J.S.A. 3A:6-4 exclusively limits the issuance of letters of administration to situations where there is an intestacy.

Not only is there no New Jersey statute that would require the probate of a will within 40 days after death (Hannoch Reason #1) but also a third party (a "fit" person) may only apply for letters where the decedent's next-of-kin fail to apply "within 40 days after the death of such intestate.." N.J.S.A. 3A:6-4. (Hannoch Reason #2) (emphasis added). The two reasons cited in the Hannoch "notice" are therefore clearly erroneous as a matter of law.

Consequently, the Hannoch notice does not meet the test enunciated in Aris Gloves, Inc., supra ["notice must be clear, definite and explicit, and not ambiguous"], it does not meet the standard defined in Frantz Equipment Company, supra ["it should give the necessary information * * * the notice is not clear unless its meaning can be compre-

hended without explanation"] and it does not constitute "substantial compliance" with the controlling statute, N.J.S.A. 3A:6-4, as required by Portage Shoe Mfg. Co., supra.

* * *

Respondent Hannoch, Weisman, Stern & Besser's appellate brief contains a reference (Db 7-24) to the source of the form of notice which was used by the firm in its application, specifically citing to 8 N. J. Practice, Clapp, Wills and Administration, §2283 (1978).

Enclosed herewith as Appendix "J" is a copy of the cited Clapp form. As can be readily seen, it contains neither of the reasons cited in the Hannoch notice but, instead, refers solely to a decedent's "intestacy." (App. J, infra, p. 15a)

The Hannoch strategem, of deleting the word "intestate" from the Clapp form of notice and inserting, in lieu thereof, the words "you having failed for more than 40

days from her death to probate any Will or to make application for Letters of Administration" was deliberately done in order to mislead the parties on whom the notice was served -- as a result of which this notice is vitiated. See: Polizzotto v. D'Agostino, 170 La. 932, 129 So. 534, 536 (1930). In re State Treasury Note Indebtedness, 185 Okla. 10, 90 P.2d 19, 22 (1939).

An exception to this rule would be found where "surplusage" which did not mislead or prejudice, would not vitiate the notice. Commercial Standard Ins. Co. v. Garett, 70 F.2d 969 (C.C.A. Okla. 1934). Wilson v. City of Long Branch, 27 N. J. 360, 142 A.2d 837, cert. denied 358 U. S. 873 (1958).

The reasons advanced by the Hannoch firm, however, do not qualify as surplusage per se. They are not in addition to a claim of intestacy, or, for that matter, any other reason. They stand in this notice as the sole cited grounds for the firm's application. However,

whether deemed "surplusage" or not, the grounds cited in the firm's notice are "misleading" and therefore the process itself is vitiated. Polizzotto v. D'Agostino, supra, at 932.

Wherefore, the process, itself is defective under the aforementioned constitutional "due process" standards, causing the "notice" herein to be a legal nullity.

* * * *

What the United States Supreme Court is actually confronted with in the within Petition is a judgment appointing an estate administrator that has been secured through fraud -- because the Hannoch notice is fraudulently misleading. See: Berkowitz v. Lyons, 98 N. J. L. 198, 119 A. 20 (1922). Not only are the grounds for the firm's application misleading, but also "wilfully made as to a material fact for the purpose of inducing another to act on them * * * to his injury." Lyster v. Berberich, 3 N. J. Super. 78, 65 A.

2d 632 (App. Div. 1949).

To constitute a fraud, intent is a necessary element. Luedeke v. Rosell, 115 N.J.L. 194, 178 A. 799 (1935). Cowley v. Smith, 46 N.J.L. 380, 50 Am. Rep. 432 (1884).

The operative facts of the within case clearly demonstrate the intent of the Hannoch firm to employ deception and artifice for the purpose of deliberately misrepresenting material facts to Petitioner. How do we know this? We know it because the complaint that was filed by the Hannoch firm states on its first page:

> "1. On November 24, 1977 Mary A. Connor died intestate..." (emphasis added)

(App. K, infra, p. 16a)

This complaint, which was never served upon Petitioner, or any other member of decedent's family, is conclusive evidence that the Hannoch firm was very much aware that "intestacy" is a statutory requirement for the issuance of letters of administration.

The next question that must be answered is whether Petitioner acted on the misleading reasons stated in the Hannoch notice, to his injury?

As heretofore related in the Statement within, upon Petitioner's receipt of the Hannoch notice he immediately contacted Mr. E. Gilman Slingerland, Jr., Esq., the attorney who had prepared Mrs. Connor's will, and inquired as to whether there was any legal obligation on Petitioner's part to probate his mother's will within 40 days, as alleged by Hannoch, Weisman, Stern & Besser. Mr. Slingerland replied that there was no such requirement, excepting that a will could not be probated within 10 days after death. N.J.S.A. 3A:3-19.

"The fundamental requisite of due process * * * is the opportunity to make an informed choice whether to acquiesce or contest * * *" Duff v. Sherlock, 432 F. Supp. 423 (D. C. Pa. 1977). Accord: Trinity Episcopal Corp v.

Romney, 387 F. Supp. 1044, 1084 (D.C.N.Y. 1974).

Petitioner consulted an attorney on the principal reason asserted in the Hannoch notice, and being informed of its legal invalidity, elected to take no further action [apart from his having already informed the court of Mrs. Connor's testacy on February 27, 1980] with respect to an application the court should have denied or, at the maximum, issued an order to show cause.

Petitioner therefore acted on the misleading application of the Hannoch firm to his injury, thus being fraudulently deprived of the executorship to which he is entitled and to which he has a right of appointment under the terms of the Last Will and Testament of Mary A. Connor.

> Fraud perpetrated by means of a judgment is no more entitled to immunity than a fraud perpetrated by means of a deed or mortgate * * * that the forms of law have been pursued is no protection in a court of equity, if the result aimed at and reached is fraud.

The Mechanics National Bank at Newark v.

Burnet Manufacturing Company, 33 Eq., 6 Stew. 487 (1881).

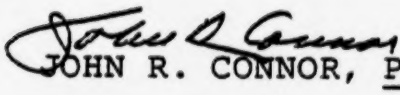
It has long been established that a "court has inherent power to control its own judgments to protect itself from the fraud of litigants." Shammas v. Shammas, 9 N. J. 321, 88 A. 2d 204 (1952). Also, "[r]elief from a final judgment or order for fraud upon the court may be allowed under New Jersey rules regardless of whether the fraud charged is denominated intrinsic or extrinsic." Id., at 321.

Wherefore, the Hannoch "notice" of application for letters of administration upon the Estate of Mary A. Connor, being fraudulent, and the Judgment appointing an administrator, being predicated upon that fraud, are both void as a matter of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



JOHN R. CONNOR, Pro se

21 September, 1980

APPENDIX A

JUDGMENT OF THE SUPERIOR COURT,
CHANCERY DIVISION, ESSEX COUNTY
Docket No. P-392-77
(Decided May 25, 1978)

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

Before:
DWYER, Chancery Judge.

DWYER, Chancery Judge:

It appearing by the complaint of Hannoch, Weisman, Stern & Besser, Esqs., that Mary A. Connor, late of the County of Essex and State of New Jersey, died on November 24, 1977, intestate; and it further appearing that due notice of the application of the plaintiff has been given to all of the com-

petent adult next of kin entitled to administration upon the estate of the said intestate, whose right thereto is prior or equal to that of the plaintiff.

It is thereupon on this 25 day of May, 1978, adjudged that letters of administration upon the estate of the said Mary A. Connor be granted to George Warren, Esq., upon his giving bond to the Superior Court of New Jersey in the sum of $5,000.00, conditioned according to law, and with sureties to be approved by this court which amount shall be received upon the filing of the inventory.

/s/ ARTHUR C. DWYER,
J. S. C.

APPENDIX B

OPINION OF THE SUPERIOR COURT OF
NEW JERSEY, APPELLATE DIVISION
Docket No. A-4484-77
(Decided September 24, 1979)

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

Before:
MATTHEWS, Presiding Judge,
ARD and POLOW, Appellate Judges.

Per Curiam

Appellant Connor appeals from the May 25, 1978 final judgment entered in the chancery division, Essex County, granting letters of administration to George Warren, Esquire, upon the Estate of Mary A. Connor.

Assuming issuance of letters of administration on application of a creditor is a "final" appealable judgment, we find appellant's argu-

ments for reversal to be unpersuasive. Jurisdiction to grant letters of administration in instances where there has been no prior application within 40 days after death is specified in N.J.S.A. 3A:6-4. See Clapp, Wills and Administration, 3d ed. §§705, pp. 276 and 280. In the words of N.J.S.A. 3A:6-15, "it shall be the duty of any person desiring original letters of administration," to make such application where decedent is intestate. That no prior application was made is undenied.

Although appellant claims to be in possession of a will of decedent which names him executor, he has rejected every effort to have him produce such a document. The duty of one who is designated executor and in possession of a will, to produce it for probate has been established since Day v. Day, 3 N. J. Eq. 549 (Prerog. 1831). See Ellicott v. Chamberlain, 38 N. J. Eq. 604 (E. & A. 1884) and Clapp, cited above, §116

at p. 204. Enforcement is provided by N.J. S.A. 3A:3-23 and is carried out, as in this case, by summary proceedings, In re Bracher's Will, 60 N. J. Eq. 350 (Prerog. 1899), aff'd. 60 N. J. Eq. 449 (E. & A. 1900).

Affirmed.

APPENDIX C

ORDER OF THE SUPREME COURT OF NEW JERSEY
SUPREME COURT OF NEW JERSEY

Docket No. 16,613
(Decided June 24, 1980)

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

Before:

WILENTZ, Chief Justice.

This matter having been duly considered by the Court, it is ORDERED that the appeal is hereby dismissed for failure to state a substantial constitutional question as required by R. 2:2-1(a).

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of June, 1980.

/s/ STEPHEN W. TOWNSEND,
Clerk.

APPENDIX D

ORDER OF THE SUPREME COURT OF NEW JERSEY
SUPREME COURT OF NEW JERSEY

Docket No. 16,613
(Decided July 21, 1980)

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

Before:

WILENTZ, Chief Justice.

This matter having been duly presented to the Court, it is ORDERED that the motion for rehearing is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of July, 1980.

/s/ STEPHEN W. TOWNSEND,
Clerk.

APPENDIX E

HANNOCH, WEISMAN, STERN & BESSER
Counsellors at Law
744 Broad Street
Newark, New Jersey 07102

January 10, 1978

Honorable Arthur C. Dwyer
Superior Court of New Jersey
Hall of Records
Newark, New Jersey 07102

Re: Connor v. Flynn
Docket No. A-898-75

Dear Judge Dwyer:

In the above-entitled matter, which is before Your Honor, there is unresolved an application by various counsel for counsel fees.

By judgment entered on October 28, 1975 by Judge Antell, fees were awarded (copy enclosed herewith), but on May 11, 1977 that judgment was reversed by the Appellate Division for reasons set forth in its opinion, also enclosed.

The matter thus has been remanded to the trial court for a new plenary hearing.

There is no immediate urgency, but since the monies paid to plaintiff pursuant to various judgments below in the substantive action are on deposit with the clerk of the court, and drawing only nominal interest, I would assume that she too, as well as counsel, would like the matter resolved.

Accordingly, may I ask that Your Honor's office procure the file in this matter and

communicate with all parties with respect to an appropriate hearing date. I believe that 1-1/2 days will be required.

I should also advise the court of one problem. In the past plaintiff has been "represented" by her son who is not a member of the bar; while no one objected to this before the Appellate Division, where the court was at least able to confine the presentation to the record and legal issues then before it, in my opinion Mr. Connor's participation at the trial court proceedings has contributed mightily to past difficulties. I will object against his participation at any future hearing, except in the capacity as a witness. I would strongly urge the court to advise plaintiff to obtain counsel or else be prepared to represent herself.

Respectfully,

/s/ ALBERT G. BESSER

AGB/mn
Enclosures

cc: Fred Blackwell, Esq.
John J. Hanlon, Esq.
Mrs. Mary Connor

APPENDIX F

SUPERIOR COURT OF NEW JERSEY
Essex County Courts Bldg.
Newark, New Jersey

January 26, 1978

Albert G. Besser, Esq.
Hannoch, Weisman, Stern
& Besser
744 Broad Street
Newark, N. J. 07102

Robert Cherry, Esq.
152 Market Street
Paterson, N. J.
07505

Mrs. Mary A. Connor
380 Wyoming Avenue
Millburn, N. J. 07041

Fred Blackwell, Esq.
19129 Roman Way
Gaithersburg, Md.
20760

John B. O'Neill, Esq.
Milton, Keane & Brady
40 Journal Square
Jersey City, N. J.
07306

Re: Connor v. Flynn

Dear Madam & Sirs:

The above-named cause has been remanded to this court for a plenary hearing on the question of counsel fees. This matter will be heard on March 2, 1978, at 9:00 a.m.

Very truly yours,

/s/ ARTHUR C. DWYER, J.S.C.

ACD:ras

APPENDIX G

380 Wyoming Avenue
Millburn, N. J. 07041
26 February, 1978

Justice Arthur C. Dwyer, J.S.C.
Superior Court of New Jersey
Essex County Courts Building
Newark, New Jersey 07102

Re: Connor
v.
Flynn

Dear Justice Dwyer:

Please be advised that a Motion for Substitution of Parties, under R.4:34-1(b), in the above matter, is pending the resolution of the matter of a correct death certificate for Mary A. Connor.

In view of my mother's death, should not the motion for substitution, at least with respect to A-898-75 [versus A-2853-74, which is pending in Chancery Division], be made in the Appellate Division?

I would further advise the court that Attorney Cherry is neither a party to any of the Connor v. Flynn proceedings nor does he represent either the Estate of Mary Ellen Flynn or the Estate of Mary A. Connor.

Very truly yours,

/s/ John R. Connor,
Executor

cc: Besser
O'Neill
Cherry
Blackwell

APPENDIX H

HANNOCH, WEISMAN, STERN & BESSER
Counsellors at Law
744 Broad Street
Newark, New Jersey 07102

March 3, 1978

Mr. Thomas B. Connor
380 Wyoming Avenue
Millburn, New Jersey 07041

Re: Estate of Mary A. Connor

Dear Mr. Connor:

This is to advise you that we are bringing an action to secure letters of administration upon the Estate of Mary A. Connor. The object of this inquiry is to give you notice of the action so that you might appear and apply for letters, if that is your wish.

In connection with our action, please advise the names and addresses of your children and the names, addresses and ages of each of your grandchildren.

Enclosed is a stamped return envelope for your convenience in replying.

Very truly yours,

/s/ ASHLEY STEINHART

/le
Enclosure

APPENDIX I

HANNOCH, WEISMAN, STERN & BESSER
744 Broad Street
Newark, New Jersey 07102
(201) 621-8800

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ESSEX COUNTY

Civil Action

In the matter of the Estate: ACTION FOR LETTERS OF ADMINISTRATION

of :

NOTICE

MARY A. CONNOR, Deceased :

TO: Thomas B. Connor, widower, and Thomas B. Connor, Jr., John R. Connor, Robert L. Connor, Carol Moken, next of kin and heirs of Mary A. Connor, deceased:

You are hereby notified that Hannoch, Weisman, Stern & Besser, a creditor of Mary A. Connor, late of the County of Essex, will on May 22, 1978, at 10:00 A.M. make application to the Superior Court of New Jersey, Hall of Records, Newark, New Jersey, for the appointment of some fit person as administrator of the estate of the said Mary A. Connor, you having failed for more than 40 days from her death to probate any Will or to make application for Letters of Administration.

Hannoch, Weisman, Stern &
Besser, Attorneys Pro se

By /s/ ASHLEY STEINHART
A Member of the Firm

DATED: Newark, New Jersey

March 21, 1978

APPENDIX J

8 New Jersey Practice, Clapp, Wills and Administration §2283 (1978)

(FORM)

ESSEX COUNTY SURROGATE'S COURT

In the Matter of the Estate of JOHN JONES, Deceased	NOTICE OF APPLICATION FOR LETTERS OF ADMINISTRATION

To: Richard Jones, one of the next of kin of John Jones, Deceased:

You Are Hereby Notified that on _____, the _____day of _____, 19__, at 9 A.M. I shall apply to the Surrogate of the County of Essex at his office in the Hall of Records, Room 206, Market and High Streets in the City of Newark, for the grant to William Jones, of letters of administration upon the estate of John Jones, late of the City of Newark in the County of Essex and State of New Jersey, who died on or about the _____day of _____, 19__, intestate.

Dated: Newark, N.J.
_____, 19__

A.B.
Attorney for William Jones

APPENDIX K

Set out below is an excerpt from the complaint filed by Hannoch, Weisman, Stern & Besser in the within matter.

HANNOCH, WEISMAN, STERN & BESSER
Counsellors at Law
744 Broad Street
Newark, New Jersey 07102

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-ESSEX COUNTY
DOCKET NO.

In the Matter of

The Estate : Civil Action

of : VERIFIED COMPLAINT IN ACTION FOR

Mary A. Connor, Deceased.: ADMINISTRATION

Plaintiff, Hannoch, Weisman, Stern & Besser, Esqs., with offices at 744 Broad Street, Newark, New Jersey 07102, by way of complaint, says:

1. On November 24, 1977, Mary A. Connor died intestate, domiciled at 380 Wyoming Avenue, in the Town of Millburn, County of Essex and State of New Jersey.

APPENDIX L

John R. Connor, Pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

In the matter of

THE ESTATE : Civil Action

OF : AFFIDAVIT

MARY A. CONNOR, DECEASED. :

State of New Jersey)
) SS:
County of Camden)

Personally appeared before me, John R. Connor, who, first being duly sworn, upon his oath, deposes and says that:

1. I have read the facts set forth in the Statement to my Petition for a Writ of Certiorari, dated September 21, 1980, and I aver, of my own knowledge, that such facts are true and correct.

John R. Connor
(Signature of Affiant)

Signed and sealed 3rd day of October
before me this ~~September~~, 1980

Maria F. Pepiak
Notary Public
State of New Jersey

MARIA F. PEPIAK
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Mar. 19, 1983